

1 Dean W. O'Connor PLLC
2 2942 N 24th Street Suite 114-336
3 Phoenix, AZ 85016
4 602-956-9555
5 Dean@dean-oconnor.com
6 Dean W. O'Connor # 011941
7 Attorney for New Horizon
8

9
10 **IN THE UNITED STATES BANKRUPTCY COURT**
11 **FOR THE DISTRICT OF ARIZONA**

12 **In Re:**

13 **SUSAN SIMPSON,**

14 **Debtor,**

Chapter 13 Proceeding

Case No: 2:20-bk-02088-EPB

15 **NEW HORIZONS ROTH 401K PROFIT**
16 **SHARING PLAN, BRAD GILBERSTON**
17 **AS TRUSTEE,**

JOINT PRETRIAL STATEMENT

Hearing on

18 **Movant,**

CONFIRMATION OF DEBTOR'S

19 **v.**

5TH AMENDED CH 13 PLAN

20 **SUSAN SIMPSON AND DARWIN**
21 **SIMPSON, a married couple,**

22 **Respondents.**

Trial on April 7, 2021 at 11:00am

23 The parties hereto, through their respective counsel undersigned, hereby submit their
24 Joint Pretrial Statement in this matter for purposes of confirming the Debtor's 5th Amended ch
25 13 plan, Docket # 152, filed on March 25, 2021.

26 **Short Statement of the Case.**

27 Susan Simpson filed a voluntary ch 13 case on 3/2/2020. At the time of filing,
28 she had existing 1st and 2nd Deeds of Trust against her residence, the 1st Deed of Trust in
favor of Chase Bank and the 2nd Deed of Trust in favor of NEW HORIZONS ROTH

1 401K PROFIT SHARING PLAN, BRAD GILBERSTON AS TRUSTEE ("New
2 Horizons"). Debtor filed to protect her residence from a Trustee Sale set by Chase Bank.
3 Debtor at the time of filing the bankruptcy case had never made a single payment on the
4 note secured by the deed of trust in favor of New Horizons. New Horizons paid Chase
5 Bank \$23,713.94 to vacate Chase Bank's Trustee's Sale.
6

7 **1. Stipulated Facts.**

8 A. Debtor Susan Simpson when she filed for relief under ch 13 on March 2, 2020.

9 B. New Horizons filed a Motion for Relief from Stay on June 1, 2020, asserting no
10 monthly regular payments were made on the loan to New Horizons by Debtor, prior to filing and
11 since filing her ch 13 case. New Horizons filed a timely proof of claim asserting the amount
12 owed prepetition, as arrearages is \$ 152,456.38, see proof of claim #5 filed 5/11/2020. Chase
13 Bank has filed a proof, claim # 3 showing prepetition arrearages originally in the amount of \$
14 304,457.90 with arrearages, and then amended the claim based on the payment to Chase Bank
15 by New Horizons in the amount of \$ 23,713.94.

16 C. The Ch 13 Trustee, filed a Motion to Dismiss this case on 9/2/2020, Docket # 83
17 on the grounds the Debtor hasn't made her ch 13 plan payments that are delinquent in the amount
18 of \$3910.00 with \$4705.00 due by Oct 3, 2020.

19 D. Debtor's original schedule I and J, show without payments to the 1st and 2nd
20 Deeds of Trusts on her house, her disposable income is \$ 2,036.00. The regular mortgage
21 payments on the 1st and 2nd mortgage are Chase \$1853.71 and New Horizon \$ 714.63. Total
22 \$2568.74, which exceeded her disposable income by more than \$600.00 per month.

23 E. The creditors Chase Bank, ADOR , and the Homeowner's Association, Colina
24 Del Norte have all filed objections to Debtor's plan.

25 F. Debtor agreed and an order has entered showing prepetition claims of \$70,000
26 owed to New Horizons to be paid through the Debtor's ch 13 plan
27
28

1 G. Debtor at the time of filing the case didn't show she was working for a roofing
2 company. Her schedules were amended showing wages and withholding from her work for
3 Gray's Air Conditioning. At her 2004 Exam on March 1, 2021 she testified she is paid
4 commissions not salary and gets a 1099. She has a 1099 from Gray's Air Conditioning for 2020,
5 showing over \$7,000.00 paid. Her bank statements for 2020 does not show all payments from
6 Gray's totaling the 1099 statement.

7 H. Debtor on 8/26/20 amended her schedules showing additional income for her
8 working for roofing company, and additional income from renters at her house, changing her
9 income from what the amount was when filed of \$4,013.00 to the current income amount of
10 \$5972.44, an increase in income of \$1,959.44. Debtor did not have the income to hire counsel
11 and got a gift of \$2000.00 to pay her counsel Gary Stickell. The disclosure of counsel shows
12 another \$2500.00 will have to be added to the plan, for his fees to be paid. Now Gray's shows it
13 paid Mr. Stickell and the moneys paid to Mr. Stickell is included in the 1099 income for 2020.

14 I. At the time the loan was made by New Horizons, Debtor claimed she was renting
15 her house out, not living there and the New Horizon loan was an investor loan. At her 2004 exam
16 Debtor testified she never had a renter move in and the lease was never commenced.

17 J. The current orders of the court require the Debtor to pay as conduit payments the 1st
18 mortgage to Chase \$1853.71 and the 2nd mortgage to New Horizons \$714.63 for a total for her
19 mortgages monthly of \$2568.74.

20 K. Parties agree New Horizon's Objection to the 3rd Amended plan is also treated as
21 New Horizon's objection to the 4th Amended plan and 5th Amended Plans.

24 **2. Debtor's Additional Facts**

25 Ms. Simpson has submitted a Fifth Amended Plan accompanied by an amended budget
26 Schedules I and J. The amended budget reflects an increase of rent from her roommates from
27 \$1,000 to \$1,500 per month. It also contains a more accurate description of her income from
28

1 Grays Air Conditioning. What Ms. Simpson believed to be hourly employment with Grays Air
2 Conditioning in September has evolved to an independent contractor agreement with irregular
3 income.

4 Further the Fifth Amended Plan and an amended budget reflects the forbearance
5 agreement with her mortgage lender JP Morgan Chase. This forbearance agreement includes
6 one month that is delinquent post-petition. Debtor will request that JP Morgan Chase permit
7 the missed post-petition payments to be deferred and added to the end of her loan. The
8 payment to JP Morgan Chase will resume in August 2021 as a conduit payment via the
9 Trustee.

11 The disposable income reflected in Debtor's Amended Schedule I and J is \$ 3,866.00.
12 The proposed payment under the proposed Fifth Amended Plan for April and May 2021 is
13 \$2,010 because Debtor is scheduled for hip surgery on April 12, 2021 and will incur out of
14 pocket expenses and perhaps a loss of income for these months. The increase of payment
15 commencing in June 2021 reflects the disposable income on the amended Schedules I and J.

17 Debtor estimates by August 2021 that she will be receiving at a minimum of \$2,500 as
18 a manufacturer's representative of Evergreen for water treatment devices that is being funded
19 by the U.S. Housing and Urban Development Program. Debtor has no contracts or written
20 evidence, showing how she will be paid as the manufacturer's representative. New Horizons
21 asserts these are not regular payments and are too speculative to fund her plan payments.

23
24 **3. Disputed Facts.**

25 **A. Is the Debtor's plan feasible?**

26 New Horizons asserts the evidence will show since the case was filed, the
27 majority of payments on Debtor's first and 2nd mortgages were paid by the CH 13 Trustee
28 from plan payments and not as conduit payments. A review of the Debtor's bank

1 statements since filing the case shows her income from all sources averages less than
2 \$4500.00 a month.

3 Debtor asserts she will get additional income starting in May 2021, but at her
4 2004 exam had no evidence of her future income, no letters and no explanation and
5 specifics of how much and when she will be paid. Her testimony as to no documentation
6 for this potential income was confirmed by an email dated 3/10/2021.

7 Additionally, her plan calls for \$70,000 in arrearages to be paid to New Horizons,
8 she needs to pay her counsel administration expenses of \$2500.00 and the claim of her
9 HOA prepetition of at least \$ 2963.57. These payments are funded through plan
10 payments. No payments have been made on these claims yet and only approx. \$5000.00
11 exists for payment of these claims a full year after this case was filed. There is 4 years,
12 48 months to pay these claims, at equal monthly amounts totaling more than \$1572.15 a
13 month. These claims plus the conduit mortgage payments total monthly \$4140.89.

14
15 B. Is the Debtor's plan proposed in good faith?

16 New Horizons asserts the Debtor got the loan from New Horizons by claiming
17 she had a renter, renting and paying rent for the house. This was not true. Debtor paid
18 her HOA current and Chase Bank current with the loan proceeds from New Horizons and
19 then made not payments to New Horizons in the loan before filing her bankruptcy case.
20 Debtor also made misrepresentation to New Horizons to get the loan, that are asserted to
21 be mortgage fraud.

22 C. Can the Debtor's plan be confirmed under the requirements of 11 U.S.C. § 1325?

23 New Horizons asserts Debtor's plan is underfunded and not filed in good faith
24 under the circumstances.

25 **Debtor's Disputed Facts**
26
27
28

1 It is Debtor's position as set forth above that her Fifth Amended Plan is feasible.
2 Movant's debt is protected by the substantial equity in her property. The objection of the Arizona
3 Department of Revenue has been resolved with ADOR making no priority claim.
4

5 **A. Issues of Law.**

6 1. Is the Debtor's plan feasible?

7 New Horizon's position:

8 Debtor's plan is not feasible, because she had insufficient income before filing
9 and since filing to pay her mortgages, resulting in arrearages owed on the First and
10 2nd mortgages. She also has failed to pay her HOA, pre and post petition. Her income
11 since filing has averaged less than \$4500.00 per month by her bank statements. She
12 has insufficient income to pay her living expenses and her current mortgage
13 payments, she is short at least \$400.00 per month. She has no income to pay over
14 \$1575.00 per month towards the prepetition arrearages in the case. She needs to show
15 regular income sufficient to make her plan payments. Her commissions haven't
16 started and future income is speculative.

17 Debtor's position:

18 It is Debtor's position as set forth above that her Fifth Amended Plan is feasible.
19
20
21

22 2. Is the Debtor's plan proposed in good faith?

23 New Horizons Position:

24 Debtor has now filed 4 plans, none of which are confirmable. Debtor claims she
25 has income increasing, but her bank statements do not support her contentions.
26 At her 2004 exam, she was unable to show regular income from her new income
27 source, Grays' Air Conditioning and states she's a friend of one of the owner's
28

1 of Gray's. Also she has for several months asserted she is going to have income
2 from Evergreen, water treatment through HUD yet at her 2004 exam she stated
3 she has no writings, even emails showing she will be paid and how she will be
4 compensated, no contract or letter regarding her compensation. She has since the
5 case was filed for months paid her mortgage payments from money she paid in
6 as plan payments to the CH 13 Trustee.

7 She has failed since filing to pay her HOA payments. She represented she
8 paid two mortgages payments in open court around Jan 19th 2021, when in fact
9 she only paid one payment and her bank statements shows she couldn't make the
10 second payment because she lacked the funds to do so. Similarly she represented
11 through counsel she had made the Dec 1, 2020 payment when due to Chase, when
12 in fact she paid Dec 2020 payment 30 days late on Dec 30, 2020. Additionally
13 she committed mortgage fraud on New Horizons to get her loan, claiming she had
14 a rental lease, when in fact that she never had a renter and states in her schedules
15 she lived in her house when the lease was represented by her to be in effect.

16 Debtor's position.

17 At the time that Debtor entered her loan agreement with New Horizons she had a signed
18 lease agreement. Subsequently, the tenant backed out of the lease agreement as the tenant did
19 not move to Arizona. Ms. Simpson's explanation for the failure one of her payments to Chase
20 Home Mortgage in January 2021 is that she anticipated that her employer would be direct
21 depositing funds into her account that would cover that payment. The direct deposit delay is
22 explained in a letter from Gray' Air Conditioning, Inc. which states in part: "You were given an
23 approximate date (usually accurate) regarding our receipt of payment by wire transfer on a job
24 you were owed a commission on. For whatever reason the bank failed to correctly credit those
25 funds, which trigger your commission payment, until February 4, 2021 when you were paid for
26 the transaction that should have paid on January 19, 2021".

27 The Fifth Amended Plan is presented in good faith.
28

1
2
3 3. Can the Debtor's plan as proposed be confirmed?

4 New Horizons Position:

5 11 U.S.C. § 1325 sets forth the requirements to confirm a ch 13 plan. The Ch 13 plan
6 must be proposed in good faith and also the Debtor must show:

7 (6)
8 the debtor will be able to make all payments under the plan and to comply with the
9 plan;

10 (7)
11 the action of the debtor in filing the petition was in good faith;

12 The evidence will show the Debtor hasn't and will not make sufficient income to fund
13 her plan and her current plan is underfunded, with monthly conduit payments exceeding
14 plan payments by over \$400 per month, with no funds to pay any of the arrearages of
15 over \$75,000.00.

16 Debtor's position:

17 The Fifth Amended Plan is confirmable. The amended budget reflects an increase
18 of rent from her roommates from \$1,000 to \$1,500 per month. It also contains a more accurate
19 description of her income from Grays Air Conditioning. Further the Fourth Amended Plan and
20 an amended budget will reflect the forbearance agreement with her mortgage lender JP Morgan
21 Chase. Debtor estimates by October that she will be receiving at a minimum of \$2,500 as a
22 manufacturers representative of Evergreen for water treatment devices that is being funded by
23 the U.S. Housing and Urban Development Program.

24 The amended budget and Fourth Amended Plan reflects the ability to begin larger
25 funding that will fully fund the Chapter 13 Plan. Because of the increase of funding, the Fourth
26 Amended Plan reduces the period of payments from 60 to 53 months.

27 A. Disputed Issues of Law. None
28

1 **B. List of Witnesses.**

2 New Horizons will call the following witnesses at trial:

3 A. Brad Gilbertson of Brads Loans and as Trustee of New Horizons. c/o Dean
4 O'Connor, counsel. Brad Gilbertson will testify to his experience as a licensed lender and all
5 matters regarding the loan made by New Horizons to the Debtor. He will testify regarding a
6 lease the Debtor had and the reasons for the loan, the lack of any payments prior to the
7 bankruptcy filing, the terms and conditions of the loan and the signing by the Debtor. How the
8 loan is handled and all matter regarding the collection and the advance made to pay Chase Bank
9 and stop the foreclosure sale on the property.

10 B. Becky Young with Evergreen Note Servicing, Address: 7310 N 16th St
11 Suite 315, Phoenix, AZ 85020, Phone: (800) 473-3898, will testify as the loan servicer
12 for New Horizon and in the preparation of the amount, interest, default interest and late fees
13 and how she calculated the amount owed by Susan Simpson as of the bankruptcy filing. She
14 will testify as to her background and the accuracy of the amounts owed under the promissory
15 note by Susan Simpson.

16 C. Susan Simpson, Debtor c/o Gary Stickel1.

17 **Debtor's Witnesses.**

18 Susan Simpson, Debtor. Ms. Simpson will testify as to her financial circumstances
19 including but not limited to her changing income and other revenue.

20
21
22 **A. New Horizon's List of Exhibits.**

- 23
24 (1) Docket 8 Application to pay filing fees in installments
25 (2) Docket 29 Schedules and statements filed by Susan Simpson
26 (3) Docket 30 Chapter 13 statement of Monthly Income
27 (4) Docket 31 Ch 13 plan
28

- (5) Docket 32 Evidence of employer payments
- (6) Docket 35 HOA Objection to ch 13 plan
- (7) Docket 36 Objection to ch 13 plan by Chase Bank
- (8) Docket 37 Objection by ADOR to Ch 13 plan
- (9) Docket 39 Trustee's plan recommendation
- (10) Docket 57 Minutes of hearing held 7/16/2020
- (11) Docket 60 New Horizons' Response to Objection to Proof of Claim 5
- (12) Docket 62 Amendments to Schedules
- (13) Docket 63 Amended Chapter 13 Plan
- (14) Docket 66 Minutes of Hearing held 8/13/2020
- (15) Docket 67 Minute entry
- (16) Docket 75 Amendments to schedules
- (17) Docket 77 Second Amended ch 13 Plan
- (18) Docket 78 New Horizons' Objection to Ch 13 plan
- (19) Docket 82 Disclosure of Compensation of counsel
- (20) Docket 83 Trustee's Motion to Dismiss case.
- (21) Docket 90, Trustee's recommendation Amended Modified Plan
- (22) Docket 91 Chapter 13 Plan and Application for Payment of Administrative Expense and Notice of Date to File Objection *Third Amended Plan*
- (23) Docket 105 Trustee Recommendation Amended or Modified Plan.
(MANEY, EDWARD)
- (24) Lease of property by Simpson prior to ch 13 case.
- (25) Debtor's bank statements with Chase Bank since filing the case until hearing 3/2020 to 3/2021.
- (26) Chase statements showing payments when made since filing the case on Debtor's first mortgage covering 3/2020 to 3/2021.

- 1 (27) Deposition Transcript of the 2004 Exam taken of Debtor on March 1,
2 2021 and all exhibits thereto.
3 (28) Minutes entries of all court hearings since Dec. 1st 2020.
4 (29) New Horizons Notice of Default dated Feb. 16, 2021.
5 (30) Letter of Gray's Air Conditioning dated Feb 2021.
6 (31) Letter of K Bear Capital LLC dated Feb 25, 2021
7 (32) Gary's Stickell's email to Den W O'Connor dated 3/9/2021 and all
8 attachments to the email.
9 (33) Gary's Stickell's email to Dean W O'Connor dated 2/26/2021 and all
10 attachments to the email
11 (34) Debtor's Loan Application given to New Horizons

12 **Debtor's List of Exhibits**

- 13 (A) Debtor's Fourth Amended Chapter 13 Plan.
14 (B) Debtor's Amended Schedule I and J dated March 12, 2021
15 (C) Debtor's 1099 from Grays' Air Conditioning for 2020
16 (D) Letter dated March 16, 2021 from Chase Home Lending
17 (E) Notice of Request for Mortgage Forbearance Due COVID
18 (F) Arizona DOR. Amended Proof of Claim
19 (G) 5th Amended Ch 13 plan
20 (H) NDC - Case Summary
21 (I) NDC - Claim Summary
22 (J) NDC - Account Ledge
23 (K) All Exhibits listed by Movant
24

25 C. **Estimated Length of Trial.** The parties estimate that bench trial will require 1/2
26 day to complete.
27
28

1 D. All exhibits have been disclosed and exchanged and there are no objections to
2 any exhibits listed for use at trial.
3

4 **RESPECTFULLY SUBMITTED** this 1st day of April, 2021.
5

6 **DEAN W. O'CONNOR, P.L.L.C.**

7 By: /s/ Dean W. O'Connor

8 Dean W. O'Connor

9 Attorney for New Horizons
10

11 Gary Stickell

12 By: /s/ Gary Stickell

13 Gary Stickell

14 Counsel for Debtor
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2

3 **ORIGINAL** of the foregoing e-filed
4 this 1st day of April, 20221, with the
5 Clerk of the Bankruptcy Court
6 and a COPY was emailed and mailed to:
7 Gary Stickell

8

9 By: /s/ Dean W. O'Connor
10 Dean W. O'Connor

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28